APPEAL NO. 032402-s
FILED NOVEMBER 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 31, 2003. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 33%. The appellant (carrier) appeals this determination. The appeal file contains no response from the claimant.

DECISION

Affirmed as reformed.

The evidence reflects that the claimant sustained compensable cervical and lumbar injuries on _____. The claimant underwent a two-level lumbar fusion on July 31, 2001. The parties stipulated that the claimant's date of maximum medical improvement (MMI) is February 13, 2002. On the date of MMI, the Texas Workers' Compensation Commission (Commission)-selected designated doctor, Dr. P, examined the claimant and assigned a 33% IR; comprised of 15% for the cervical spine under Diagnosis-Related Estimate (DRE) Category III and 25% for the lumbar spine under DRE Category V. The hearing officer found that the great weight of the other medical evidence was not contrary to Dr. P's report and concluded that the claimant's IR is 33%. On appeal, the carrier makes four specific arguments: (1) Dr. P improperly applied the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) in assigning a 25% IR for the lumbar spine under DRE Category V without the required objective evidence; (2) Dr. P improperly applied the AMA Guides by assigning an IR for the lumbar spine based on a condition that did not exist at the time of MMI; (3) Dr. P improperly applied the AMA Guides by assigning an "IR in the cervical spine for radiculopathy based on unverifiable measurements"; and (4) the hearing officer "used the wrong legal standard in abandoning the statue and the [AMA Guides] in favor of a [Commission] advisory."

With regard to the lumbar spine, Dr. P determined that the claimant's condition warranted a rating under DRE Category V: Radiculopathy and Loss of Motion Segment Integrity. On appeal, the carrier does not take issue with the rating assigned for radiculopathy; rather, it asserts that it was inappropriate for Dr. P to assign a rating based on loss of motion segment integrity subsequent to the fusion, which the carrier argues would "cure" the condition, and without the benefit of roentgenograms. It is undisputed that Dr. P did not base his rating for loss of motion segment integrity on flexion and extension roentgenograms. Dr. P noted in his letter of clarification dated April 22, 2002, that, at the time the claimant underwent surgery to his spine, the roentgenograms were not required because the 4th edition of the AMA Guides were not in effect; that the opinion of the operating surgeons regarding loss of motion segment integrity must be given "significant credence"; and that the claimant should not be

penalized for the lack of availability of the x-rays or because he "has the desired solid fusion of the lumbosacral spine" and the x-rays are no longer possible.

The AMA Guides provide the following:

> DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity
>
> Description and Verification: The patient meets the criteria of DRE lumbosacral category III and DRE lumbosacral category IV, that is, both radiculopathy and loss of motion segment integrity are present (Table 71, differentiators 2, 3, 4, and 5, p. 109). Significant lower-extremity impairment is indicated by atrophy or loss of reflex(es), numbness with an anatomic basis, or electromyographic findings as in lumbosacral category III and loss of spine motion segment integrity as in lumbosacral category IV.
>
> Structural Inclusions: Structural compromise is present, as is documented neurologic or motor compromise.
>
> Impairment: 25% whole-person impairment.

In Texas Workers' Compensation Commission Appeal No. 022509-s, decided November 21, 2002, we held that under the AMA Guides, loss of motion segment integrity must be based on flexion and extension x-rays. However, as outlined above, the AMA Guides instruct that placement into Lumbosacral Category V may also be based on the presence of structural compromise. The general information regarding spinal examinations found on page 3/99 of the AMA Guides provides the following:

> Structural Inclusions
>
> Certain spine fracture patterns may lead to significant impairments and yet not demonstrate any of the findings involving the differentiators [one of which is loss of motion segment integrity evidenced by roentgenograms]. Therefore, with the Injury Model, "structural inclusions" are included in some of the DRE categories. If the patient has a condition that meets the definition of a category that includes a structural inclusion, the physician need not determine if the other criteria for that category are present.
>
> If the patient demonstrates the structural inclusions of two categories, the physician should place the patient in the category with the higher impairment percent

An illumination of this distinction, is found in Advisory 2003-10, which the Commission issued on July 22, 2003, and provides the following clarification for rating spinal fusions:

> For spinal fusion, the impairment rating is determined by the preoperative x-ray tests for "motion segment integrity" (page 102, 4th Edition of the *Guides to the Evaluation of Permanent Impairment*). If preoperative x-rays were not performed, the rating may be determined using the following criteria:
>
> a. One level uncomplicated fusion meets the criteria for DRE Category II, Structural Inclusions. **This spinal abnormality is equivalent to a healed "less than 25% Compression Fracture of one vertebral body".**
>
> b. Multilevel fusion meets the criteria for DRE Category IV, Structural Inclusions, **as this multilevel fusion is equivalent to "multilevel spine segment structural compromise**" per DRE IV. [Emphasis in original.]

We would point out that although Advisory 2003-10 provides for placement in DRE Category IV for loss of motion segment integrity based on the existence of a multilevel fusion, the AMA Guides instruct that the condition provided for in DRE Category IV, coupled with radiculopathy, would warrant placement in DRE Category V. Dr. P assigned the IR prior to, and irrespective of, the issuance of Advisory 2003-10. The hearing officer, relying on Advisory 2003-10, determined that Dr. P's rating for the lumbar spine should be afforded presumptive weight. The carrier essentially contends that in issuing Advisory 2003-10, the Commission engaged in ad hoc rulemaking, and as such, the hearing officer's reliance on the advisory is tantamount to applying the "wrong legal standard." Whether the Commission exceeded its authority in issuing Advisory 2003-10 is a matter for the courts. *See* Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003. The hearing officer did not err in relying on the advisory, which was effective at the time of the hearing, even though it was not the basis for Dr. P's IR. Nor was it error for the hearing officer to adopt an IR which rates a condition, loss of motion segment integrity, which presumably did not exist at the time of MMI because it had been corrected by the fusion, as the advisory makes clear the rating is warranted in cases where surgery has been performed for the condition in question.

The carrier also argues that the hearing officer erred in adopting the report of Dr. P because he assigned a 15% IR for the cervical spine under DRE Category III "based on unverifiable measurements." The AMA Guides provide, in part, that placement in DRE Category III is warranted in the following situation:

> The patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes or (2) unilateral atrophy with greater than 2-cm decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The neurological impairment

may be verified by electrodiagnostic testing or other criteria (differentiators 2, 3, and 4, Table 71, p. 109).

Specifically, the carrier contends that nerve conduction study in evidence does not comport with the requirements outlined in differentiator 4, and that Dr. P's atrophy measurements were taken on the thigh and, as such, is not valid for assessing cervical radiculopathy. It is clear from his report that Dr. P did not consider or rely upon atrophy of the upper extremity in deciding to place the claimant in DRE Category III. Rather, as clarified in Dr. P's letter dated April 22, 2002, the IR for cervical radiculopathy was determined to be correct "when the electrodiagnostic studies were correlated with this claimant's complaints and findings on physical examination." Dr. P's initial examination notes indicate the absence of upper extremity reflexes and the nerve conduction study indicated findings that "may suggest possible cervical radiculopathy." For these reasons, we cannot agree that the rating for DRE Cervicothoracic Category III is inappropriate.

Section 408.125(e) provides that, for a compensable injury that occurred prior to January 17, 2001, where there is a dispute as to the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor was a factual question for the hearing officer to resolve. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we cannot agree that the hearing officer erred in granting presumptive weight to Dr. P's report. However, we note that Dr. P incorrectly arrived at an IR of 33% when, relying on the combined values chart (CVC) provided for in the AMA Guides, he combined 25% for the lumbar spine with 15% for the cervical spine. Combining the values for the lumbar and cervical spine actually yields a 36% whole person IR under the CVC. For this reason, the hearing officer's decision is reformed to reflect that the claimant's IR is 36%. Old Republic Insurance Company v. Rodriguez, 966 S.W.2d 208 (Tex. App.-El Paso 1998, no pet.).

The hearing officer's decision and order is affirmed as reformed.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO MALO**
**ZURICH NORTH AMERICA**
**12222 MERIT DRIVE, SUITE 700**
**DALLAS, TEXAS 75251**.

_____
Chris Cowan
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert W. Potts
Appeals Judge